IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEBRA BARNETT, GEORGIE HARTWIG, and BELLA BLAUBERGS, on their own behalf and on behalf of all other similar situated, Respondents, v. WAL-MART STORES, INC., a Delaware corporation, d/b/a WAL-MART, d/b/a SAM'S CLUB, and d/b/a SUPERCENTER, Appellant.	)	No. 55491-3-I DIVISION ONE UNPUBLISHED FILED: July 3, 2006

COX, J. -- The sole issue before us in this review is the propriety of the trial court's certification of a class in this action for wages and other relief by former and current Washington employees of Wal-Mart. Specifically, we must decide whether the trial court's revised definition of a class originally proposed by plaintiffs satisfies the requirements of CR 23. Because the trial court did not abuse its discretion by redefining the class as it did, we affirm.

This case arises from allegations by putative members of a class of potentially 53,000 former and current Wal-Mart employees who have worked in Wal-Mart's 35 stores in Washington since September 10, 1997. The essence of their claims is that Wal-Mart routinely and systematically denies its employees

proper rest and meal breaks, requires employees to work off the clock to complete their tasks, and manipulates employee time records to avoid paying overtime.

Debra Barnett, Georgie Hartwig, and Bella Blaubergs ("Barnett") commenced this action in September 2001. After two years of extensive discovery, they moved to certify this case as a class action. The trial court issued its memorandum opinion certifying a class for "Labor Claims" and "Consumer Claims" that it incorporated into its Order Granting Class Certification in Part, entered on November 29, 2004. The court rejected Barnett's proposed class definition, but revised it in respects that we describe later in this opinion.

Wal-Mart sought discretionary review of the order certifying the class. We granted discretionary review in part and denied it in part. Thereafter, a panel of judges considered additional briefing of the parties and heard oral argument.

Class Definition

Wal-Mart maintains that the trial court abused its discretion in certifying the class, as redefined by the court, because the class definition does not comport with the requirements of CR 23(b)(3). More specifically, Wal-Mart argues that the court's revised definition requires the court to delve into the merits of individual claims, creates an improper "fail-safe" class, and is not administratively feasible. None of these arguments is persuasive.

"A prerequisite to a Rule 23 action is the actual existence of a 'class.'"[1]

Class definition is critical because it "identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a Rule 23(b)(3) action."[2] The defined class must be sufficiently identifiable without being overly broad.[3] A class definition that is defined objectively and with sufficient precision makes it possible for a court to determine that all the CR 23 requirements for class certification have been met.[4]

A proposed class definition must not depend on subjective criteria or the merits of the case or require extensive factual inquiry to determine who is a class member.[5] Because courts may not determine the merits of the case at the certification stage, a class definition is inadequate if it requires the court to make a determination on the merits in order to identify individual class members.[6]

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[1] Sanneman v. Chrysler Corp., 191 F.R.D. 441, 445 (E.D. Pa. 2000) (citing In re A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989); Clay v. American Tobacco Co., 188 F.R.D. 483 (S.D. Ill. 1999)).

[2] See Manual for Complex Litigation § 30.14 (3d ed. 1999); Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981).

[3] See Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977); Substitutes United for Better Schools v. Rohter, 496 F. Supp. 1017, 1021 (N.D. Ill. 1980).

[4] 5-23 Moore's Federal Practice, Civil § 23.21[3][d]; Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974) (plaintiffs bear the burden of proving that all of the requirements for certification have been met); Simer, 661 F.2d at 670.

[5] See Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 382-83 (D. Colo. 1993).

[6] Eisen, 417 U.S. at 177-78.

Our courts generally favor a liberal interpretation of CR 23 because the rule "avoids multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation."[7] One moving for class certification bears the burden of demonstrating that they meet the requirements of that rule.[8] Courts may consider both the pleadings and examine the parties' evidence to the extent necessary to determine whether the requirements of CR 23 have been met.[9] When a court considers the pleadings at a relatively early stage of the litigation, it may generally assume that because the class actions are a specialized proceeding available in limited circumstances, the trial court must conduct a "'rigorous analysis'" of the CR 23 requirements to determine whether a class action is appropriate in a particular case.[10]

We review a trial court's class certification decision for an abuse of discretion.[11] We will uphold the court's decision if the record indicates that the court considered the CR 23 criteria and if the decision is based on tenable

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[7] Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 250, 63 P.3d 198 (2003).

[8] Miller v. Farmer Bros. Co., 115 Wn. App. 815, 820, 64 P.3d 49 (2003) (citations omitted).

[9] Id.

[10] Id.

[11] Lacey Nursing Ctr. v. Dep't of Revenue, 128 Wn.2d 40, 47, 905 P.2d 338 (1995).

grounds and is not manifestly unreasonable.[12] We resolve close cases in favor of allowing or maintaining the class.[13]

Individualized Merits Determination

Wal-Mart first argues that the trial court's class definition does not meet the requirements of CR 23(b)(3) because it requires the court to make individual determinations on the merits in order to identify members of the class. We disagree.

The Order Granting Class Certification in Part entered on November 29, 2004 redefines the plaintiffs' proposed class as follows:

> All current and former hourly paid employees of Wal-Mart Stores, Inc. (including Wal-Mart Stores, Supercenters and Sam's Clubs, but excluding distribution centers) in the state of Washington who worked off the clock without compensation and/or worked through any part of a rest or meal break from September 10, 1997 through the date judgment is entered in this action and who have not held a salaried management position with Wal-Mart at any time during that period.
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> . . .
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> The order further provides that:
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> > The liability phase will determine whether Defendant [Wal-Mart] had actual or constructive knowledge that its hourly employees were not being paid for all hours worked, either because that work was performed off the clock, because employees were not permitted to take all or part of their meal and rest breaks, or because time records were deleted or otherwise altered. . . . .[14]

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[12] Lacey, 128 Wn.2d at 47 (citing Eriks v. Denver, 118 Wn.2d 451, 467, 824 P.2d 1207 (1992)); Oda v. State, 111 Wn. App. 79, 91, 44 P.3d 8, review denied, 147 Wn.2d 1018 (2002).

[13] Sitton, 116 Wn. App. at 250.

[14] Order Granting Class Certification in Part at 14.

Wal-Mart argues that the order defines a class where "the ***only*** way to identify Wal-Mart associates who are actual class members would be to [first] resolve the [] merits of liability for each person's individual claim."[15] Wal-Mart claims that the court must resolve "the paramount liability issue presented by this case: whether each individual Wal-Mart associate was required or permitted to work without receiving compensation that he or she was entitled to, or was required to work through breaks."[16] We disagree.

We begin our application of the relevant law to this case by identifying what the class must prove. As the trial court correctly noted in its order, the employees prove their statutory claims for wages by showing the employer failed to pay them for all the time they were "employed." Under the relevant wage and hour statutes, "to employ" includes "to permit" to work.[17] And an employer "permits" its employee to work when it has either actual or constructive knowledge of the allegedly uncompensated work.[18] Thus, the question is whether members of the class worked off the clock, missed meal and/or rest

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[15] Corrected Brief of Petitioner Wal-Mart Stores, Inc., at 25 (emphasis in original).

[16] Id.

[17] United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co., 84 Wn. App. 47, 52, 925 P.2d 212 (1996), abrogated on other grounds, Seattle Professional Engineers Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 991 P.2d 1126 (2000).

[18] Id.

breaks, or were locked in the building at the end of the shift ***and*** whether Wal-Mart had actual or constructive knowledge of uncompensated work.

First, although Wal-Mart argues that the class definition demands a resolution of whether Wal-Mart "required or permitted" its employees to work without compensation, no such language appears in the order. We would be inclined to agree that such language, if included in the order, would suggest a resolution of liability. That is because such language would, in effect, suggest knowledge of Wal-Mart that its employees were working without statutorily required compensation. But no such language is in this order.

Rather, the plain words of the order define the class differently: "employees of Wal-Mart stores … who worked off the clock without compensation and/or who worked through any part of a rest or meal break." The order further separates the liability issue by framing it as "whether [Wal-Mart] had actual or constructive knowledge that its hourly employees" were not being properly compensated under the wage statutes.

We see no other way in which the court could have adequately defined the relevant class without offending the rule that it could not resolve the merits of individual claims. The definition is proper.

Second, the relevant cases support our conclusion that the definition is proper. Barnett cites, among other cases, Dunn v. Midwest Buslines, Inc.,[19] a racial discrimination case in which the court denied class certification for a

[19] 94 F.R.D. 170, 172, 1982 U.S. Dist. LEXIS 12645 (E.D. Ark. 1982).

number of reasons, among them the fact that the class definition required a finding on the merits in order to identify class members.[20] The definition included African American employment applicants "who have been denied employment by defendant due to race." The court held the definition improper because it depended "on a finding of discrimination in order to define the class. A class of 'those who have been actually discriminated against' has no limits until conclusion of the trial on the merits."[21]

Barnett correctly argues that the proposed definition in this case contains no such merits based language. The language here does not require a resolution of any disputed factual issue.

Here, Wal-Mart contests whether employees worked without compensation or through breaks ***and*** whether Wal-Mart knew of or permitted any such work. A potential defense here is that there is no way for plaintiffs to prove, using time-keeping records, that 'off the clock' work occurred.

At any rate, even if some employees did indeed work off the clock, liability does not turn on that factual determination. Unlike in Dunn, where liability turned on whether the denial was based on racial discrimination, liability here is not premised on an employee's failure to take a break or clock in before working

[20] "CR 23 is identical to its federal counterpart, Fed. R. Civ. P. 23, and thus, federal cases interpreting the analogous federal provision are highly persuasive." Pickett v. Holland Am. Line-Westours, 145 Wn.2d 178, 188, 35 P.3d 351 (2001) (citation omitted).

[21] Dunn, 94 F.R.D. at 172.

for which there may be legitimate reasons. Liability turns on whether Wal-Mart knowingly permitted or required work without compensation. Further, where, as here, class certification is sought at the early stages of litigation, courts generally assume that the allegations in the pleadings are true.[22]

Wal-Mart cites Petty v. Wal-Mart Stores, Inc.,[23] in which it claims a "nearly identical" definition was rejected by the trial court.[24] But the definition in Petty contains the merits based language "required or permitted to work off the clock."[25] Thus, like the definition in Dunn, class member identification in Petty turned on the central issue of liability – whether the employer required or permitted off the clock work.

In Smith v. Behr Process Corp.,[26] the court approved a class definition consisting of "All persons and entities who purchased defendant's Products 'Super Liquid Raw-Hide' or 'Natural Seal Plus' and applied said Products to a natural wood exterior such as log homes, wood siding and wood fencing," within 19 different counties.[27] Liability turned on whether the products were defective

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[22] Smith v. Behr Process Corp., 113 Wn. App. 306, 320 n.4, 54 P.3d 665 (2002) (citing Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975)).

[23] 148 Ohio App. 3d 348, 773 N.E.2d 576 (2002).

[24] The denial of certification was upheld on appeal because the appellate court held that plaintiff failed to meet the predominance and superiority requirements. Petty, 148 Ohio App. 3d 355.

[25] Petty, 773 N.E.2d at 579.

[26] 113 Wn. App. 306.

[27] Behr, 113 Wn. App. at 319.

and whether the company had misled consumers.[28] The plaintiff class members were still required to prove causation and damages – Behr could raise a number of factual defenses, such as the individual never purchased the product, never applied it, applied it improperly or never suffered damage as a result. Simply crafting the class definition in terms of the plaintiffs' claims did not make the definition merits based.[29]

In short, the class definition here does not require the court to make individual determinations on the merits in order to identify members of the class.

"Fail-safe" Class

Wal-Mart next contends that the definition improperly creates a "fail-safe" class that would be bound by judgment only in the event that the class prevailed at trial. We disagree

A "fail-safe" class that, by definition, is based on resolving the ultimate liability issue is bound only by a judgment favorable to plaintiffs but not by a judgment favorable to defendants.[30] Wal-Mart cites several distinguishable

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[28] Behr, 113 Wn. App. at 321.

[29] Noble v. 93 Univ. Place Corp., 224 F.R.D. 330, 341-42 (S.D.N.Y. 2004) (noting that "certification is routinely granted where the proposed class definition relies in part on the consideration of defendants' alleged liability."); see Vizcaino v. United States Dist. Court, 173 F.3d 713, 722 (9th Cir. Wash. 1999) (rejecting the notion that defining a class of employees by their common claim to have been injured by their employer's unlawful actions is "circular" and requires a finding on the merits to identify class members); Forbush v. J.C. Penney Co., 994 F.2d 1101, 1105 (5th Cir. Tex. 1993) (holding that to not permit a class to be defined in terms of the legal claims brought "would preclude certification of just about any class of persons alleging injury from a particular action.").

cases in which class certification was denied, in part, because the definition created a "fail-safe" class. In each case, the class was fail safe because the definition included merits based language that turned on the ultimate issue of liability.[31]

Here, Wal-Mart can prevail by refuting the allegations of improper employment practices that resulted in wage and hour law violations, because liability turns on Wal-Mart's knowledge and actions, rather than the fact that an employee worked off the clock or missed meal and rest breaks.

The latter outcome would not create a situation where no class existed because employees who allegedly worked off the clock would be bound by a finding that Wal-Mart neither required nor permitted such work, unless they opted out of the class.[32]

Administrative Feasibility

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[30] Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 404-05 (Tex. 2000).

[31] See Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980) (holding trial court properly denied certification of class of children with improperly identified learning disabilities who are not receiving special education); Dafforn v. Rousseau Associates, Inc., 1976 U.S. Dist. LEXIS 13910, 1976-2 Trade Cas. (CCH) P61, at 219 (N.D. Ind. 1976) (holding that because class would consist of only those homeowners who paid illegal fees, a jury determination that defendants did not charge illegal fees would mean there was no class); Capital One Bank v. Rollins, 106 S.W.3d 286 (Tex. App. Houston 1st Dist. 2003) (class defined as customers charged fees in excess of express terms of contract when central liability issue was what fee level was authorized by the contract).

[32] See Knuth v. Benefit Wash. Inc., 107 Wn. App. 727, 728, 31 P.3d 694 (2001), review denied, 145 Wn.2d 1035 (2002) (affirming dismissal of plaintiff's claims because claims "arise out of the same transactional nucleus of facts from a previously resolved class action.").

Wal-Mart also contends that the class definition is improper because identifying the individual class members is not administratively feasible using objective standards. Specifically, Wal-Mart contends that members of the class can only be determined through lengthy individualized inquiry because class members cannot be identified by looking at "objective employment records." Because the trial court has numerous tools available to administer this case as a class action, we disagree.

Although CR 23 does not explicitly address the problem of identifying class members, courts have recognized that parties who seek class action certification must establish that a suitable method of identification is "administratively feasible."[33] A "basic requirement" of a class action under CR 23 is that class membership must be "capable of ascertainment under some objective standard."[34]

Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, "saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation."[35] "[A] primary function of the class suit is to provide

[33] Rios v. Marshall, 100 F.R.D. 395, 403 (S.D.N.Y. 1983) (citing 7 C. Wright and A. Miller, Federal Practice and Procedure § 1760, at 581 (1972)); accord Barnett v. Bowen, 794 F.2d 17, 23 (2d Cir. 1986).

[34] Crosby v. Social Security Admin., 796 F.2d 576, 580 (1st Cir. 1986) (quoting 3B Moore's Federal Practice P 23.04[1], at 23-119).

[35] Brown v. Brown, 6 Wn. App. 249, 257, 492 P.2d 581 (1971).

a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group."[36] As a federal court has stated, "the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing the class action."[37]

In determining whether a class is adequately defined, courts consider whether the proposed definition "specif[ies] a particular group that was harmed during a particular time frame, in a particular location, in a particular way and … facilitat[es] a court's ability to ascertain its membership in some objective manner."[38] "The standard for measuring whether a class has been defined with sufficient precision is whether the definition makes it administratively feasible for the court to determine whether a particular individual is or is not a member of the proposed class."[39] Courts have declined to certify a class where the proposed definition would not enable identification of class members short of individualized fact-finding.[40] Simply put, "[a] court should deny class certification

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[36] Brown, 6 Wn. App. at 253.

[37] Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968).

[38] Bentley v. Honeywell Int'l, Inc., 223 F.R.D. 471, 477 (S.D. Ohio 2004).

[39] 5-23 Moore's Federal Practice, Civil § 23.21[1]; Crosby, 796 F.2d at 580; Rochford, 565 F.2d at 977.

[40] Crosby, 796 F.2d at 580; Noble, 224 F.R.D. at 338 **(**class definition is rejected if mini-hearing on merits of each plaintiff's case will be necessary to ascertain their class membership).

where the class definitions are overly broad, amorphous, and vague, or where the number of individualized determinations required to determine class membership becomes too administratively difficult."[41]

However, "certification is routinely granted where the proposed class definition relies in part on the consideration of defendants' alleged liability."[42] If this were not the case, the benefits of the class action mechanism could be significantly undermined because "plaintiffs seeking relief based upon a defendant's alleged unlawful practice or policy might be precluded from collectively bringing suit."[43]

Because class determinations necessarily are made on a case-by-case basis, and the trial court has wide discretion in certifying and managing them, it is instructive to examine cases in which certification was denied due to an administratively infeasible class definition.

In Simer v. Rios, the Seventh Circuit rejected the class definition of "all low income persons otherwise eligible for participation in the 1979 CIP who were denied 1979 CIP assistance by the federal defendants or discouraged from applying for assistance because they were not delinquent in the payment of their fuel bills for 1979," in part because of the difficulty of determining who would be considered "low income" and how to identify "discouraged" members because it

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[41] Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 269 (S.D. Fla. 2003).

[42] Noble, 224 F.R.D. at 341-42.

[43] Id. at 342.

required a state of mind finding.[44]

In a national medical monitoring action, plaintiffs proposed a class of "(1) All persons in the State of Florida who ingested Metabolife 356 at the dosage levels recommended by the Defendant and (2) All persons residing in States within the United States that recognize a cause of action for medical monitoring who ingested Metabolife 356 at the dosage levels recommended by the Defendant."[45] The class definitions were rejected. The district court held that the definition contained no limitation as to dosage or duration of ingestion, no minimum duration of usage, and the phrase "dosage levels recommended by defendant" was so imprecise as to require individualized hearings on the merits of each individual claim to determine class membership in part because "recommended levels" included a wide range of dosages.[46] Finally, because taking two pills on only one occasion would have qualified an individual for class membership,[47] identification of class members would have required the court to determine a minimum dosage level for class membership. In essence, this would have been a "determination on the ultimate issue as to whether ingestion of fewer than two or three pills a

[44] Simer, 661 F.2d at 664.

[45] Perez, 218 F.R.D. at 265.

[46] Perez, 218 F.R.D. at 265.

[47] Perez, 218 F.R.D. at 268.

day [could] result in increased risk of injury."[48]

The N.J. District Court rejected as amorphous, vague, and overly broad the definition "all persons of color who were stopped, detained, and/or searched by New Jersey State Police on the New Jersey Turnpike for the period January 1, 1993 through April 3, 2001." Noting the near impossibility of administering such a class, the court said

> This definition has nearly no parameters. It spans nearly a decade in time, a period involving several State Police Superintendents, some named as defendants, some not, three administrations and includes no geographic distinctions. Furthermore, this definition does not attempt to distinguish between persons who were breaking a traffic law when they were stopped and those who were not. Finally, this definition fails to distinguish between those who received citations and those who did not, and people who had their vehicles searched and those who did not."[49]

Sanneman v. Chrysler Corp.[50] concerned an action for damages from automobile paint failure.[51] The court rejected the class definition as unmanageable because it comprised "at least eight model years, 13 different manufacturing plants and hundreds of makes and models, with hundreds of different kinds and colors of paint supplied by two different paint companies."[52] The court noted that there was no one product, nor

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[48] Perez, 218 F.R.D. at 268.

[49] White v. Williams, 208 F.R.D. 123, 129 (D.N.J. 2002).

[50] 191 F.R.D. 441.

[51] Sanneman, 191 F.R.D. at 444.

[52] Sanneman, 191 F.R.D. at 450.

any specific defendant act to evaluate. It involved hundreds of thousands of vehicles, about which the court said, "[W]e cannot conceive of how to manage the flood of people who will believe they might be in the class.[53]

In comparison, as the trial court noted, the definition used here makes identifying class members more manageable. In its order, the trial court discussed its broad discretion under CR 23 to resolve individual issues and manage the action through a variety of tools to deal with challenges that may arise.[54] The trial court also ordered a bifurcated trial. And the court also noted its discretion to create subclasses, separate issues, and modify the class definition as litigation progresses.[55] These tools, and others that the trial court may utilize, fall well within the range of discretion that the trial court has available to it to manage this case.

The fact that some individual determinations must be made does not make this case unmanageable as a class action. "The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a class action precluded by the presence of individual defenses against class plaintiffs."[56]

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[53] Sanneman, 191 F.R.D. at 450.

[54] Sitton, 116 Wn. App. at 256 ("case management . . . is a matter best determined by the trial court").

[55] Order Granting Certification in Part at 12-14.

[56] 1 Alba Conte & Herbert Newberg, 1 Newberg on Class Actions § 3:12

"[F]ailure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule."[57]

To summarize, the trial court's many management tools make identification of individuals administratively feasible.

Ascertainability

Wal-Mart next argues that the class definition is improper because CR 23 requires that members of the class be presently ascertainable and here, identification of class members first requires a trial on the merits of each individual member or a finding of liability. We disagree.

While class members must be presently ascertainable, this does not prevent the trial court from applying the definition to actually make the identification after a judgment on the merits.

> "Often the court will say that it is essential that class members be able to be identified in order to give notice and include class members in the final judgment. This is not required however – even at the time of final judgment—so that having an amorphous class definition does not justify denial of class certification."[58]

As observed by the Manual for Complex Litigation, "Rule 23(b)(3) actions

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at 315 (4th ed. 2002).

[57] Wal-Mart Stores, Inc. v. Visa USA, Inc. (In re Visa Check/Master Money Antitrust Litig.), 280 F.3d 124, 148 (2d Cir. N.Y. 2001).

[58] 1 Newberg § 2:3 at 69; see e.g., Eisen, 417 U.S. 156 (upholding an antitrust class action on behalf of approximately 6 million members, only 2 million of whom were reasonably able to be identified).

require a class definition that will permit identification of individual class members, while Rule 23(b)(I) or (b)(2)actions may not." Due process requires greater precision for definitions in Rule 23(b)(3) actions because of the mandatory notice requirement and the frequent necessity of dealing with individualized claims.[59]

The definition must include objective rather than subjective criteria that makes the plaintiff class identifiable.[60] But there is no requirement that each individual class member be specifically identified at any particular stage of the action – even prior to final judgment.

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[59] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) ([C]lasses certified under CR 23(b)(3) require the option to litigate separately and the best practicable notice of their rights to all class members.).

[60] Subjective criteria are those that contain vague terms or (e.g., "frequently called," "positions of a confidential nature," "involved in the peace movement") or contain terms relating to the plaintiff's state of mind, making it difficult to determine who is part of the class (e.g., "in fear of harassment," "deterred from applying for employment by unlawful acts"); c.f., e.g., De Bremaecker v. Short, 433 F.2d 733, 734 (1970) (class definition included state residents active in the peace movement who had been harassed or were in fear of harassment); Wagner v. Central Louisiana Elec. Co., 99 F.R.D. 279, 282 (E.D. La. 1983) (subclass included "customers . . . ***to whom the co-op would have already extended [service] but for the unlawful agreement*** . . . ."); Zeltser v. Hunt, 90 F.R.D. 65, 66 (S.D.N.Y. 1981) (class included those who purchased silver futures contracts, silver bullion, or refined silver in ***commercial quantities***); Conway v. City of Kenosha, 409 F. Supp. 344, 347 (E.D. Wis. 1975) (general class consisted of all present and future city employees who live or will live in the future outside the county of Kenosha; subclasses included city employees who are not required by their jobs to be ***frequently called to unscheduled active duty on short notice*** and those employees in professional or management positions ***of a confidential nature*** who cannot be union members)(emphasis added).

Here, the class is sufficiently precisely defined as required for purposes of notice. The class will be bound by a final judgment.

We affirm the class certification order.

Cox, J.

WE CONCUR:

Grosse, J.

Coburn, J.